

**Remarks/Argument:**

Claims 44, 46 – 48, 50 – 55, and 59 are presented for examination.

A. §112 Rejection

Claims 44, 46-48, 50-55, and 59 are rejected under §112, 2<sup>nd</sup> paragraph as indefinite. The Examiner considers Claim 44 to be vague and indefinite because of the phrase “A food comprising a mixture of cocoa polyphenols as a food additive, the cocoa polyphenol mixture comprising.” The Examiner states that it is unclear if the food itself is the food additive or if the mixture of cocoa polyphenols is the food additive. In addition, the Examiner notes that Claim 44 fails to recite any operative amount of the claimed food additive. Therefore, the Examiner believes it is unclear if the food additive (i.e., mixture of cocoa polyphenols) is the active agent within the food composition or if it is merely some type of inert agent or if it is present in very small amounts representing perhaps a contaminant or residue. The Examiner concludes that if the claimed food additive is an essential element of the invention, it should be clearly defined (functionally) in the claim language by the phrase “a therapeutically effective amount of” (based upon the therapeutic uses disclosed in the specification). Accordingly, the Examiner strongly suggested that the phrase be amended to recite: “A food comprising a therapeutically effective amount of a food additive, wherein the food additive consists essentially of a mixture of cocoa polyphenols comprising” to overcome this rejection.

B. Applicants' Response to §112 Rejection

Claim 44 has been amended substantially as suggested by the Examiner. The open ended language “comprising” rather than “consisting essentially of” has been used to define the cocoa polyphenol food additive. The language defining the mixture of cocoa polyphenols has been clarified by using “which mixtures comprise” and “which mixture is prepared” to describe the particular cocoa polyphenols present in the mixture and to describe the method used to prepare the mixture of cocoa polyphenols.

C. Double Patenting Rejection

Claims 44, 46-48, 50-55, and 59 have been rejected under the judicially-created doctrine of obviousness-type double patenting over Claims 1-11 and 14-16 of U.S. Patent No. 6,562,863. Although the conflicting claims are not identical, the Examiner believes they are not patentably distinct because both are drawn to a product comprising a mixture of cocoa polyphenols including catechin, epicatechin, and procyanidin oligomers therein. Although the present claims are drawn to a food

comprising cocoa polyphenols, the cited claims of the '863 patent reasonably read upon a food since the cocoa extract claimed in the '863 patent is edible and provides nutritional value and, thus, is useful as a food.

D. Applicants' Response to Obviousness – Type Double Patenting Rejection

It is respectfully submitted that the amended food claims are not obvious variants of the partially-purified, solvent-derived cocoa extract claims of the '863 patent. While the '863 patent does point out that the cocoa extracts are from an edible source, it does not suggest the use of the cocoa extract in a food in a therapeutically effective amount. The only food disclosed in the '863 patent is peanut oil to which cocoa extracts and fractionated cocoa extracts were added to demonstrate the antioxidant properties of the extracts and fractionated extracts (see Example 9). This teaching does not render obvious the present claims.

E. Closing

Entry of this Amendment is respectfully requested. No new matter is presented.

Withdrawal of the §112, 2<sup>nd</sup> paragraph rejection and the obviousness-type double patenting rejection is respectfully requested.

The Examiner is thanked for the helpful suggestions regarding the claim language.

Respectfully submitted,

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